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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

BASHIRAHMED M. AMEJI, M.D.,
Petitioner,

v.

FREDERIC J. COWAN, ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondent's brief in opposition amply demonstrates the importance of the issue presented in this case and the need for this Court's review. As explained in the petition, the issue squarely presented here is one this Court left open in *Estelle* v. *McGuire*, 112 S. Ct. 475 (1991). Pet. 9. The Court held there that " 'federal habeas corpus relief does not lie for errors of state law' " alone; instead, a habeas petitioner must demonstrate that his conviction was obtained in violation of his constitutional rights to due process and a fair trial. 112 S. Ct. at 480 (quoting *Lewis* v. *Jeffers*, 110 S. Ct. 3092, 3102 (1990) and citing *Pulley* v. *Harris*, 465 U.S. 37, 41 (1984)). The question left unanswered in *McGuire*, however, is the standard to be applied in determining whether a defendant's due process and fair trial rights were violated.

The Sixth Circuit's established standard, which looks to whether the conviction was supported by "substantial evidence . . . within the context of the entire record" (Pet. 10-11), fails to undertake the principal inquiry conducted by at least three other circuit courts of appeals, *viz.* whether the effect of the disputed testimony was so prejudicial that it rendered the defendant's trial fundamentally unfair. *E.g.*, *Thigpen* v. *Thigpen*, 926 F.2d 1003, 1012 (11th Cir. 1991); *United States* v. *DeRobertis*, 738 F.2d 168, 171 (7th Cir.), *cert. denied*, 469 U.S. 924 (1984); *Warden* v. *Wyrick*, 770 F.2d 112, 116 (8th Cir.), *cert. denied*, 474 U.S. 1035 (1985). Consistent with the Sixth Circuit's standard, neither the district court below nor the court of appeals ever engaged in this inquiry. The failure to do so, however, is inconsistent both with these other circuit courts' as well as this Court's established precedents. Respondent's brief in opposition merely repeats and amplifies this failure.

a. Respondent attempts to resolve the split among the circuits identified in the petition (Pet. 11-12) by striving to show that the Sixth Circuit's standard is not what it plainly is. Respondent argues that the standard set forth at length in *Waters* v. *Kassulke*, 916 F.2d 329 (6th Cir. 1990), *Lundy* v. *Campbell*, 888 F.2d 467 (6th Cir. 1989), *cert. denied*, 495 U.S. 950 (1990), and *Cooper* v. *Sowders*, 837 F.2d 284 (6th Cir. 1988) somehow applies only where a habeas petitioner has made claims of "cumulative" error. However, the opinion in *Waters*, which was not a cumulative error case, belies that assertion. In *Waters*, the Sixth Circuit explains and applies the same standard used in *Cooper* and *Lundy*. Respondent's attempt to cleave a distinction between "cumulative error" cases and other claims of error for purposes of applying the Sixth Circuit's standard collapses of its own weight.

Respondent further attempts to resolve the circuit split identified in the petition by repeatedly arguing that the Sixth Circuit's decision in this case was consistent with

McGuire. Opp. 14, 17, 20. That argument misses the point entirely. *McGuire* did not address the issue of what standard is to be applied in determining whether a defendant's due process and fair trial rights were violated. There, the Court overturned the Ninth Circuit's holding that the disputed testimony was admitted in violation of state law because, the Court concluded, the evidence was probative of a crucial element of the state's case—intent. 112 S. Ct. at 481. Here, however, as argued in the petition and under the same evidentiary standards set forth by respondent in its opposition, the "other crimes" evidence was erroneously admitted in violation of both state and federal law. Thus, the question left open in *McGuire* is squarely presented here and warrants review.

b. Respondent's own arguments also reveal the constitutional infirmity of the Sixth Circuit's standard. Respondent relies upon this Court's decision in *Huddleston* v. *United States*, 485 U.S. 681 (1988) and the Sixth Circuit's decision in *United States* v. *Zelinka*, 862 F.2d 92 (6th Cir. 1988), to explain the proper application of Fed. R. Evid. 404(b).[1] Opp. 24-26. In *Huddleston*, the Court emphasized that evidence of "extrinsic acts that might adversely reflect on the actor's character" is generally prohibited and described the fundamental considerations to be weighed in deciding whether to admit such evidence. 485 U.S. at 685. First, the evidence must be probative of a material issue other than character. *Id.* at 686. Second, even where the evidence is found to be probative, a court must also examine the extent to which that evidence might prejudice the defendant. *Id.* at 688. None of the courts which has heard petitioner's case has applied the second prong of this analysis.

With regard to the first prong of the analysis described in *Huddleston*—"whether [the disputed] evidence is pro-

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[1] Respondent explains that Kentucky law on the admissibility of other crimes evidence is consistent with federal law and, specifically, this Court's *Huddleston* opinion. Opp. 24-27.

bative of a material issue other than character" *id.* at 686—respondent argues that "other crimes" evidence was correctly admitted "to show petitioner's criminal intent, knowledge, and that a plan or scheme existed to bribe and harass Eugena Keeton." (Opp. 29); see also Pet. App. 10a.[2] The "material issue," however, is whether that "scheme or plan" involved criminality. See *Huddleston*, 485 U.S. at 683 (distinguishing between fact that tapes petitioner was accused of stealing were in fact stolen (which was not disputed) and "material issue" of whether petitioner knew they were stolen).

None of the "other crimes" witnesses testified to the existence of other crimes or even of bad acts. What the disputed evidence *does* describe is lawful attempts by petitioner, through Music and others, to investigate and defend against the State's charges of fraudulent reporting practices. See Pet. 6-7, 13. Accordingly, the "other crimes" evidence could only have been introduced to show petitioner's "propensity" for criminality. Respondent's conclusory assertion that the evidence was admissible because it was relevant (Opp. 28-29) merely begs the question.

Even if the evidence is properly considered probative, however, the second prong of the analysis described in *Huddleston* was ignored by the Sixth Circuit under its standard and was never applied in this case. Thus, the court of appeals never examined the extent of the prejudicial effect resulting from the admission of the disputed testimony, despite the Court's ruling in *Huddleston* that "[t]he determination *must* be made whether the danger of undue prejudice outweighs the probative value of the evidence . . . ." 485 U.S. at 688 (emphasis added and citation omitted); see also *O'Bryan* v. *Commonwealth*, 634 S.W.2d 153, 156 (Ky. 1982) (recognizing the highly prejudicial nature of "other crimes" evidence and hold-

[2] Contrary to respondent's assertion (Opp. 27-28), the record below reflects that petitioner does not contest that there was a common scheme or plan in this case. Pet. App. 12a.

ing that such evidence is not admissible unless its prejudicial nature is outweighed by its probative value). Despite the clear mandate of *Huddleston*, and the example of other courts of appeals (*e.g.*, *Thigpen*, 926 F.2d at 1012; *DeRobertis*, 738 F.2d at 171; *Wyrick*, 770 F.2d at 116), none of the courts examining petitioner's case *ever* explored the level of prejudice petitioner might suffer from the admission of this evidence.

In this case, the prejudicial effect of the disputed evidence rendered petitioner's trial fundamentally unfair. The disputed evidence, which suggests that Music had contacted others on petitioner's behalf, gives the impression that petitioner had the propensity to harass, that he was engaged in a "cover-up" by offering money for each affidavit secured by Music, and that therefore he was "crooked," when, in fact, the evidence was consistent with lawful behavior. See Pet. 13-14.

In a transparent effort to avoid the obvious result of a proper analysis, the district court here sought to bolster the probative weight of the evidence by highlighting the prosecution's "need" for the evidence. See Pet. App. 11a. As observed in the petition, "necessary" is a highly unusual definition of "probative" (Pet. 15 n.8), a term which actually connotes relevance to the proposition to be accepted or rejected, *viz.* that petitioner bribed or harassed witnesses. Using this unique definition of "probative," the Kentucky court and, by extension, the district and circuit courts here, found greater and greater probative weight in the disputed evidence as the likelihood increased that this evidence was the only substantive evidence against petitioner, no matter how egregious the error in its admission or how great its unreliability. This perverse result is so inherently unfair that by itself it should command this Court's attention.

Even assuming that the prosecution's need for the evidence somehow increased its probative weight, courts must nevertheless, pursuant to the holding of *Huddleston*, examine the prejudicial effect of that evidence. See *supra*

p. 3. Thus, both the Kentucky court of appeals and the Sixth Circuit, in failing to examine the prejudicial effect of the "other crimes" testimony admitted in this case, completely set aside process in favor of result.

* * * *

Respondent's arguments cannot erase the split among the circuits reflected in this case and only serve to bolster petitioner's claim that the failure of the courts below to examine the prejudicial effect of the disputed testimony rendered petitioner's trial fundamentally unfair. Under the Sixth Circuit's standard, which looks solely to whether there is "substantial evidence" for conviction in light of the "context of the entire record," the court of appeals abandons its reviewing responsibilities when assessing due process challenges to state convictions based upon disputed evidentiary rulings. What makes this approach particularly pernicious is that it is so ingrained in Sixth Circuit law that the court now disposes of these issues without opinion. For this reason, this Court should intervene now. In sum, this Court's review remains necessary to correct the Sixth Circuit's established—and constitutionally infirm—standard.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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